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DR. MARK M. FRIEDMAN  
C/O BILL POLKINGHORN - DISCOVERY DISPATCH  
9003 FLORIN WAY  
UPPER MARLBORO, MD 20772

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**APR 20 2007**

**OFFICE OF PETITIONS**

|                                   |   |             |
|-----------------------------------|---|-------------|
| In re Application of              | : |             |
| Yosi Bar-Erez                     | : |             |
| Application No.: 09/581990        | : | DECISION ON |
| Filing or 371(c) Date: 06/21/2000 | : | PETITION    |
| Attorney Docket Number: 1529      | : |             |

This is a decision in response to the Petition to Withdraw Holding Abandonment, filed January 16, 2007. The petition is properly treated under 37 CFR 1.181. The delay in treating this petition is regretted.

This Petition is hereby **dismissed**.

Any further petition must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under [insert the applicable code section]." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely and properly reply to the final Office action, mailed May 5, 2004, wherein the Examiner rejected claims 26-45, 51, 52, 55 and 56. The Office action set a three (3) month period for reply, and provided for extensions of time under 37 CFR 1.136(a).

Applicant filed a Notice of Appeal in response to the Office action on September 9, 2004, and Appeal Brief on January 3, 2005. The Examiner filed an Answer on March 21, 2005. The Board of Patent Appeals and Interferences ("Board") issued an Order returning the appeal to the Examiner on July 27, 2005, and the Examiner issued a Notice of Defective Appeal Brief on August 9, 2005. Applicant filed an Appeal Brief on September 7, 2005. The Examiner filed an Answer on December 5, 2005. The Board issued a Decision on November 16, 2006, affirming all rejections on appeal.

Applicant files the present petition and asserts non-receipt of the Board Decision.

**Applicable Law, Rules and MPEP**

The MPEP 711.03(c)A, Petition To Withdraw Holding of Abandonment Based on Failure To Receive Office Action, provides

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133). To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. **The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.** For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions). (Emphasis supplied)

MPEP 711.03(c)

#### Analysis

Applicant has failed to demonstrate that the Office communication was not received. Applicant must, in addition to stating that the Board Decision was not received, also state that a search of the file jacket and docket records reveal that the Board Decision was not received, and provide a copy of the file jacket and docket records to this Office. The petition is dismissed without prejudice. Applicant should file a Request for Reconsideration of Petition and include the necessary statements and copies of docket records and file jacket.

It is also noted that the correspondence address of record indicates that the Board Decision was mailed to Applicant care of Bill Polkinghorn at Discovery Dispatch. Applicant is advised that the statement of non-receipt must be from a person with firsthand knowledge of the non-receipt, in this instance, the person receiving Applicant's correspondence at Discovery Dispatch. Finally, it is again noted that the showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail.

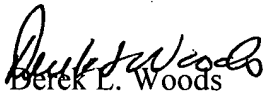
Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents  
PO Box 1450  
Alexandria, VA 22313-1450

By FAX: (571) 273-8300  
Attn: Office of Petitions

By hand: Customer Service Window  
Randolph Building  
401 Dulany Street  
Alexandria, VA 22314

Telephone inquiries concerning this matter should be directed to the undersigned at (571) 272-3232.



Derek L. Woods  
Attorney  
Office of Petitions